87-326

NO. 84-1601

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

versus

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

Amicus Brief of The Defense Research Institute
and Trial Lawyers Association
in Support of Petitioner
G. D. Searle & Co.

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STATEMENT OF INTEREST

The Defense Research Institute and Trial Lawyers Association (DRI) respectfully moves for leave to file the attached brief *amicus curiae* in support of G. D. Searle and Company, the Petitioner, as provided in Rules 36.3 and 42 of the rules of this Court. Petitioner has consented through its attorneys to the filing of this brief. Respondents' attorneys have refused such consent.

DRI is a national association of approximately 13,000 members including defense trial lawyers, judges, law professors, and corporate and insurance company members. Our membership consists principally of individual trial lawyers in private practice who usually represent defendants. One of the purposes of DRI is to work to preserve and improve the civil justice system as a means of resolving civil damage disputed fairly, efficiently and promptly.

The economic burden of mass tort litigation is a reality. A major factor in the ultimate cost of defense is the expense of discovery, including responding to requests for the production of documents. In this litigation, some 500,000 documents have been produced. The court has required Searle to produce "each and every document contained in it's files which relates to the CU-7 IUD". It is suggested that inherent in every such request is the opportunity for abuse of the discovery process.

The example of discovery abuse is not the real and present danger presented by this litigation, however. The significance of the issue before the court is the further erosion of the attorney-client confidential relationship. The opportunity to mount a meritorious defense using the full resources available to a defendant through its legal and risk management services must be preserved if the adversarial system is to

function. This litigation affords a vehicle for a definitive decision of a defendant's right to muster its resources in it's defense. It is in response to this challenge of the right to defend that DRI seeks to file this brief.

STATEMENT OF ISSUES AND STATEMENT OF THE CASE

The statement of issues and statement of the case presented by Searle in brief are adopted.

ARGUMENT

A. THE DOCUMENTS SOUGHT ARE NOT WITHIN THE SCOPE OF DISCOVERY

The purpose of discovery under the Federal Rules of Civil Procedure is to allow both parties to have access to all of the facts relevant to a particular case. The United States Supreme Court stated in *Hickman v. Taylor*, 329 U.S. 495 (1947), that the methods of discovery were to:

> Serve (1) as a device, along with the pretrial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus, civil trials no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

329 U.S. at 501 (footnotes omitted). Thus, the policy behind the discovery rules is to get the facts out, and therefore the rules will "be accorded a broad and a liberal treatment". 329 U.S. at 507. The major concern behind the discovery rules and the broad scope of discovery in particular is the desire for proper or fair litigation:

> Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage

> at which the disclosure can be completed from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries.

329 U.S. at 507. Notice that the policy behind discovery is the disclosure of *relevant facts* in order to eliminate surprise *at trial*, thus resulting in fair litigation. Rule 26(b)(1) provides for discovery of any "matter, not privileged, which is relevant to the subject matter involved in the pending action." Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 of the Federal Rules of Evidence. The issues of the cases at hand concern liability and damages, and certainly Searle's risk assessments of the litigation has no tendency to make the existence of any of these issues more or less probable. These documents would not in any way tend to make for a fair trial, because none of the documents deal with facts that could be put before a judge or jury. These documents would rather only aid the plaintiff's counsel in negotiating for a settlement, clearly giving him an unfair advantage in such negotiations while not furthering at all the policy behind discovery - a fair trial.

In *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), the court reiterated that the policy behind discovery is to "make a trial less a game of blind man's bluff and more a fair contest with basic issues and facts disclosed to the fullest practicable extent." 356 U.S. at 682. Thus the object of discovery is to make the trial a fair contest, not to enhance one party's position in settlement negotiations by giving him access to information completely irrelevant to the facts to be determined at trial. An attorney's assessment of the risk of

litigation is just such irrelevant information. As the Supreme Court pointed out in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), in dealing with the scope of discovery, the "key phrase in this definition - 'relevant to the subject matter involved in the pending action' - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to a matter that could bear on any issue that is or may be relevant in the case." 437 U.S. at 351. (citing *Hickman*). But at the same time the court recognized that within the phrase were boundaries which could not be ignored:

> Discovery of matter not "reasonably calculated to lead to discovery of admissible evidence" is not within the scope of Rule 26 (b)(1). . . . For the same reason, an amendment to Rule 26(b) was required to bring within the scope of discovery the existence and contents of insurance agreements under which an insurer may be liable to satisfy judgment against the defendant, for that information ordinarily cannot be considered, and will not lead to information that could be considered, by any court or jury deciding any issue.

437 U.S. at 351-52. Likewise, the reserves in this case as well as the risk management studies are not such materials as would be "reasonably calculated to lead to the discovery of admissible evidence" and therefore do not fall within the scope of discovery under 26(b)(1). Such documents are clearly irrelevant, for they have nothing to do with liability or damages, just as the existence of insurance is irrelevant on either of these issues.

Finally, Rule 26(g) requires every discovery request or response or objection to be signed by an attorney of record.

The signature constitutes a certification, that, among other things, the request is: ". . . (3) Not unreasonable . . . given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues at stake in the litigation." All discovery requests made under the authority of Rule 26 are necessarily limited by the requirements of subsection (g) and the certification of counsel.

Applying the prohibition of subsection (g) leads to the conclusion that this discovery request for petitioner's reserve calculations and procedures must be measured by the "needs of the case". It is suggested that the needs of the case limitation may be reasonably imposed upon the further restriction that discovery of admissible evidence. When the request for Searle's reserve calculations and procedures is evaluated within the limitations suggested, a fair interpretation of the request and the rule logically leads to the denial of the request for the information without any consideration of work product or other claim of confidentiality. The court is not confronted with the issue that evidence touching an element of the plaintiff's causes of action or a defense interposed by the defendant will remain undiscovered. This need of the case certification then is undoubtedly based upon a factor other than the discovery of relevant facts relating to the issues to be litigated. The risk management studies and aggregate reserves of Searle, both of which involved Searle's attorneys' legal opinions concerning the risk of litigation, do not fall within the category of relevant facts necessary for the trial.

The reality of modern communication within the American corporate structure requires the reduction of information to written documents. The transmission of information between those charged with the responsibility of decision making is crucial to the judgmental processes which allow a

business to function. Protection of the message communicated between the lawyers and the decision-makers allows free and independent exchange of recommendations and considerations to enable the employment of available resources and for appropriate planning.

The logic of allowing discovery of design planning, manufacturing procedures, marketing strategy, quality control mechanism, advertising, etc., all of which relate to the product and the consumer in the marketplace, is reasonable and should be anticipated. The process which allows the defendant to fully utilize it's legal and risk management personnel in its defense must be protected and remain confidential, absent some showing of mandating a contrary result. The system of civil justice will be poorly served if discovery of information of the character sought in the instant litigation is permitted. Defendant corporations will be denied the opportunity to fully utilize the talents of those employed in procedures if communication must be inhibited by the threat of loss of confidentiality and the subsequent discovery of the strategy for economic planning for the resolution of litigation.

B. WORK PRODUCT PROTECTS THE DOCUMENTS FROM DISCLOSURE.

A further limitation on the scope of discovery is the work product rule:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative

> (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 26(b)(3) of the Federal Rules of Civil Procedure. Although the work product rule limits the scope of discovery, it furthers the policy behind discovery, the policy of making for a fair trial. This rule provides for the protection of documents and other tangible things, otherwise relevant and non-privileged, prepared in anticipation of litigation. Such documents can only be discovered after an appropriate showing. The rule also provides for further protection of mental impressions, thus recognizing a distinction between ordinary and opinion work product. *See Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985). The policy underlying the work product doctrine is the realization that it is necessary to protect the document prepared by the attorney (or others) in anticipation of litigation, thereby creating the necessary environment to encourage proper preparation of a case thus enabling the adversary system to function properly. But a further policy of this rule is to protect the attorney's mental impressions and opinions: "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely

practical one, grounded in the realities of litigation in our adversary system." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

The theory underlying our adversary system of justice is that through the clashing of two well prepared and knowledgeable attorneys, the truth emerges in litigation, thus there is a need for both sides to equally prepare on their own and neither to have an unfair advantage. The avoidance of an unfair advantage is the policy behind the liberal discovery rules - both parties should have equal access to facts, regardless of which party is in possession of such facts. Likewise, the avoidance of any unfair advantage also underlies the work product doctrine - neither party should be able to invade the privacy of the opposing attorney's preparation of his case. Although at times it may be necessary to allow one party to obtain discovery of the work product of the other party in order to allow the party to ascertain facts, when the objects of discovery consist of opinions, mental impressions, or evaluations of the case of the opposing counsel, 26(b)(3) gives special protection to such documents.

The Supreme Court analyzed the situation in *Hickman* as:

> An attempt without purported necessity and justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of the discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

329 U.S. at 510.

That "public policy underlying the orderly prosecution and defense of legal claims" requires protection of the attorney's work product, because in serving his client:

> It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interest.

329 U.S. at 511.

In *Hickman* the court noted that the work product of the attorney is reflected in a variety of ways, both tangible and intangible, and is not limited to mere memoranda and briefs. 329 U.S. at 511. The court indeed gave great protection to such work product:

> Were such material opened to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511.

The policy behind *Hickman* is based upon the belief that the adversary system is at its best when both attorneys prepare their own case. The court did recognize an area where discovery of work product may be had: "where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 329 U.S. at 511. But notice the emphasis here is on the facts, and there does not appear to be any relevant facts involved in the risk management documents of Searle, but these are merely assessments of the risk of litigation of the case and estimated settlement and verdict values. Allowing one party access to such documents containing the opposing attorney's evaluation of the risks of litigation in a case violates the policy of *Hickman*.

Because the "general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure," the burden rests on the party seeking to invade the privacy to show adequate reasons for doing so. *Hickman*, 329 U.S. at 512. Rule 26(b)(3) preserves this notion, requiring a "showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(3) goes on to provide for special protection from mental impressions of the attorney, stating that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Recognize how this provision provides not only for protection of the attorney's legal theories and opinions, but also for the protection of those opinions by other representatives of the party, such as those who are in the risk management department at Searle who provided input into these documents. Rule 26(b)(3) recognizes that it is essential

to the adversary process that an attorney's mental impressions be protected. Remember also that the allowance of discovery under the work product rule is for the discovery of facts, and should never be considered as allowing the discovery of an attorney's mental impressions or opinions, because the rule states that when allowing discovery after a necessary showing, "the court shall protect against disclosure of" such mental impressions.

In *Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985) the court found that the work product doctrine protected the selection process of documents by an attorney, since that process revealed the attorney's mental impressions and legal opinions. The Third Circuit recognized that: "preserving the privacy of preparation that is essential to the attorney's adversary role is the central justification for the work product doctrine." 759 F.2d at 316 (citing *Hickman*). The court went on to state:

> Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case and the inferences he draws from interviews with witnesses. [citations]. Such material is accorded almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in insuring that each side relies on its own wit in preparing their respective cases [citations].

759 F.2d at 316. It appears that the plaintiff in Searle is not seeking any facts through his discovery of the documents but is merely seeking the risk evaluations of the attorneys in order to enhance his position for settlement.

The documents at issue reveal the attorney's "evaluation of the strengths and weaknesses of his case". Furthermore there is no "factual content in such items" that is useful to the preparation of the plaintiff's case which would insure a fair trial. The only use of this information will be to the plaintiff's counsel for his use in settlement negotiations. That is the only relevance of such reserves, they have nothing to do with liability or damages, which are the issues in the case.

The policy of the work product rule and the policy behind discovery must be applied together. The policy behind discovery is to give both parties access to facts, while the policy behind the protection of work product is to encourage preparation of a case, and the further protection of opinion work product is to protect the mental impressions of an attorney and thereby encourage similar preparation. These policies do not conflict. Such policies are compatible and both are necessary for justice, because, while the discovery of facts assist the parties in their preparation of a case, the protection of work product encourages both parties to, in fact, develop their own case.

Another case dealing with the work product doctrine is *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). In that case the court stated:

> The issue on appeal is whether a deponent's mere acknowledgement of the existence of corporate documents is protected by the work-product doctrine or the attorney-client privilege. We hold that where, as here, the deponent is opposing counsel and has engaged in a selective process of compiling documents from among voluminous files in preparation for litigation, the mere acknowledgement of the existence of those documents reveal

> counsel's mental impressions, which are protected as work product.

805 F.2d at 1326. The court stated that in *Hickman* "the Supreme Court acknowledged the well recognized policy against invading the privacy of an attorney's course of preparation. The court held that a party may invade the privacy in search of relevant and non-privileged facts only upon a showing of adequate justification." 805 F.2d at 1328. The emphasis is on relevant and non-privileged *facts* and not upon obtaining the *legal opinion* of the attorney and how he assesses the risk in litigating a case. The court concluded that the attorney's "selective review of AMC's numerous documents was based upon her professional judgment of the issues and defenses involved in this case. This mental selective process reflects Burns' legal theories, and thought processes, which are protected as work product." 805 F.2d at 1329. Certainly the documents sought by the plaintiff in the Searle case reflect legal theories and thought processes of the Searle attorneys and the Risk Management Department in that the documents consist of opinions addressing the likely outcome of the cases in litigation and the settlement values of such cases. If the selection of documents by an attorney is viewed as the type of mental process protected as work product, an attorney's assessment of the risk in litigating a case and the probable settlement value of such cases is also protected, for that goes to the core of the attorney's role in evaluating and advising a client in preparation of litigation.

C. THE DOCUMENTS FALL WITHIN THE SCOPE OF ATTORNEY-CLIENT COMMUNICATIONS.

The Risk Management documents and aggregate reserves are also protected by the attorney-client privilege. This privilege, like the work product doctrine, is to encourage proper preparation of cases and allow the client to be fully apprised of his legal rights and duties. This court has stated:

> Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that sound legal advice serves the public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). It has been stated that this privilege is based "on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, and that these benefits outweigh the risks posed by barring full revelation in court." Weinstein's Evidence, ¶ 503[02] at 503-15. In *Matter of Fischel*, 557 F.2d 209 (9th Cir. 1977), the court concluded:

> The rationale for the rule is to encourage clients to confide fully in their attorneys without fear of future disclosure of such confidences. This in turn will enable attorneys to render more complete and competent legal advice. . . . The purpose of the privilege is to protect and foster the client's freedom of expression.

Id. at 221. Concerning the scope of the privilege the court stated:

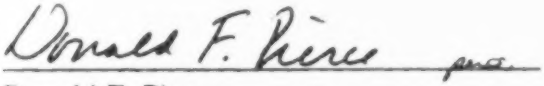
> Of necessity the privilege is not limited to the actual communication by the client to the attorney. Ordinarily the compelled disclosure of an attorney's communications or advice

> to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the client's communication as well as the attorney's advice in response thereto. *See United States v. United Shoe Machinery Corp., supra.* It also extends to those papers prepared by an attorney or at an attorney's request for the purpose of advising a client, provided the papers are based on and would tend to reveal the client's confidential communications.

Id. at 221. The Risk Management documents do not magically lose their confidentiality simply because information is pooled to determine aggregate numbers. The documents retain their privileged status.

CONCLUSION

For the reasons advanced above, the decision of the Eighth Circuit should be reversed.



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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 25th day of September, 1987, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed and first class postage pre-paid.

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